

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD ANDREWS
Claimant

VS.

JT THORPE & SON, INC.
Respondent

AND

KEMPER INSURANCE
Insurance Carrier

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Docket No. 1,011,803

ORDER

Claimant appeals the August 28, 2003 preliminary hearing Order of Administrative Law Judge (ALJ) Jon L. Frobish.

ISSUES

Although claimant indicates he generically appeals the ALJ's "[d]enial of workers compensation benefits," the true nature of this appeal stems from the ALJ's finding that claimant failed to meet his burden of proof with respect to the issue of proper notice as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board (Board) finds that the ALJ's findings should be affirmed.

K.S.A. 44-534a and K.S.A. 2002 Supp. 44-551 limit the issues which may be appealed from a preliminary hearing order. Those issues, which have been considered jurisdictional and, therefore, appealable, deal with whether the employee suffered an accidental injury, whether the accidental injury arose out of and in the course of the employee's employment, whether notice was given or claim timely made and whether certain defenses apply.¹

¹ K.S.A. 44-534a(a)(2).

In this instance, claimant has appealed the ALJ's determination that notice was not properly given. Accordingly, the Board has jurisdiction to review this matter.

Claimant alleges he was injured on or about March 13, 2003 when a brick fell on his head. Claimant testified that he told his supervisor, Warren Jameson, of the accident the following day. Mr. Jameson, who goes by the moniker "Curly," testified he recalled no such event. In fact, the first notice Mr. Jameson had of claimant's alleged accident came from Brad Gibson, respondent's safety manager.

When asked to expound on the facts and circumstances surrounding his attempt to provide notice, claimant testified that Curly directed him to the trailer and gave him an accident report to fill out. Claimant further testified that as he was filling out the form another individual came into the trailer. During his discovery deposition, claimant could not recall this individual's name. Then, at the preliminary hearing claimant testified he believed the man to be named Dave Guy. When the accident report was completed claimant testified he gave it to "the number two guy," who is purportedly an individual named Dean McGinnis. Neither Dave Guy nor Dean McGinnis testified. But according to Mr. Jameson, Mr. McGinnis knew nothing of any such accident report.

After considering the evidence presented during the preliminary hearing, the Board finds no reason to disturb the ALJ's findings. Claimant's recitation of the facts as to notice is directly controverted by the testimony of Warren Jameson. Although claimant takes issue with respondent's failure to produce "the one witness that could address the issue,"² it is claimant's burden to prove the essential elements of his claim.³ The ALJ's preliminary hearing Order is affirmed in all respects.

WHEREFORE, the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on August 28, 2003 is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² Claimant's Brief at 2 (filed Sept. 15, 2003).

³ K.S.A. 44-501(a).